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HIGH COURT OF CHHATTISGARH AT BILASPUR
S.B. : HON'BLE SHRI JUSTICE VIJAY KUMAR SHRIVASTAVA
WRIT PETITION NO. 1858/2004

PETITIONER : **M/s. Waidhan Engineering & Industries Pvt. Ltd., Registered Office at Plot No.54 & 56, Udyog Deep, Industrial Estate, Post Office: Waidhan, Dist. Sidhi (MP).**

versus

Respondents :

1) **Chhattisgarh State Electricity Board through its Secretary, Chhattisgarh State Electricity Board, Dagania, Raipur (CG).**

2) **Superintending Engineer (Purchase & Works), HTPS, Chhattisgarh State Electricity Board, Korba (West) Dist. Korba (CG).**

3) **M/s. Thejo Engineering & Services Pvt. Ltd., Chennai (Tamil Nadu).**

PRESENT :

Mr. N.S. Kale, Sr. Counsel with Mr. Kapil Patwardhan Counsel for the petitioner.

Mr. Prashant Mishra, Sr. Counsel with Shri H.S. Patel, Counsel for the respondents No. 1 and 2.

Mr. N.K. Agrawal, Sr. Counsel with Shri Kamrul Aziz, Counsel for respondent No.3.

O R D E R

(Passed on 15th June, 2005)

By this petition under Article 226/227 of the Constitution of India, petitioner has prayed to issue a writ of

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certiorari quashing the decision of respondent No.1 Board for re-tendering the work of conveyor belt joining, replacement of belts, rubber lagging on conveyor pulleys, longitudinal jointing of belts and spot patch repairing and other conveyor work (by cold vulcanizing process) in respect of Korba West and East Thermal Power Stations of CSEB (henceforth "the impugned work") for a period of three years and for issuance of a writ of mandamus commanding respondents 1 and 2 to consider the offer/price bid and to award the impugned work to the petitioner.

2) It is averted in the petition that the petitioner-M/s. Waidhan Engineering and Industries Private Limited is a Private Limited Company which is engaged in the work of conveyor belt joining, replacement of belt, rubber lagging etc., and is undertaking such activities in Power Plants of M/s. National Thermal Power Corporation Ltd., Korba; Sakti Nagar, Vindhya Nagar; Rihand Nagar, ATPS Anapara (UP); Northern Coalfields Limited, Singrauli and also in some other big organizations as also in Bhilai Steel Plant, Bhilai. Respondent No.1 is a State Electricity Board constituted in the State of Chhattisgarh under the provisions of Electricity Supply Act and engaged in the generation and supply of electricity in the State of Chhattisgarh. Respondent No.2 is the Superintendent Engineer of respondent No.1. Respondent No.1 floated notice inviting tender dated 08/09/2003 inviting sealed tenders from experienced contractors against tender specification dated 08/09/2003 to award the impugned work and due date for submission of the tender was 14/10/2003. Petitioner in order to participate in the tender, made application for grant of

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tender documents and deposited Rs. 1,000/-. Petitioner obtained tender forms after satisfying the requirements of qualifying conditions. Clause 3 of the tender conditions provides for submission of bids on the tender/bids in three parts i.e, Part 1, Earnest Money Deposit, Part 2 Techno Commercial bid and Part 3 Price bid. Petitioner succeeded clearing Part 1 and 2, therefore, the date of opening of part III was notified to the petitioner by fax message intimating that price bid of the said tender shall be opened on 20/02/2004 and on 20/02/2004 the price bid was opened in presence of representatives of the petitioner as well as respondent No.3. The total contract amount as per the price bid quoted by respondent No.3 is Rs.224.13 lacs whereas the total contract amount, as per price bid of the petitioner was Rs. 181.83 lacs. Respondent No.2 prepared a comparative chart on the basis of lowest price and recommended the petitioner's offer for acceptance to respondent No.1/Chhattisgarh State Electricity Board.

3) Respondent No.1 who is the competent authority to take a decision to award the contract to a suitable tenderer without assigning any reason for not accepting the lowest bid returned that proposal with a direction to re-tender the impugned work. Although the right to refuse the lowest or any other tender is always available to the competent authority, but the principle laid down in Article 14 of the Constitution of India, cannot be ignored and the power cannot be exercised arbitrarily, despite that respondent No.1/Board directed for re-tendering without considering the fact that by re-tendering, the public exchequer

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would suffer a loss of Rs.42 lacs. It appears that respondent No.3 is presently executing the similar kind of work with respondent No.1 and respondent No.1 wanted to award the said contract to respondent No.3, but looking to the suitability of the petitioner and the difference in price to favour respondent No.3 directed for re-tender of the impugned work.

4) Respondents No. 1 and 2 raised preliminary objection regarding tenability of the petition and also stated that though the petitioner's price bid was opened but on close scrutiny by the highest decision making authority at the Apex level it was found that the petitioner does not possess requisite experience as per the pre-qualification requirement and also not submitted proof of having undertaken work of conveyor belt joining, replacement of belt, rubber lagging etc., by cold vulcanizing process whereas the notice inviting tender was for the work of conveyor belt joining, replacement of belt, rubber lagging etc., by cold vulcanizing process and not by hot vulcanizing process, as also from the list/details furnished by the petitioner during last three years in respect of scope of work specified in the instant tender is for Rs.63,41,996/- only against desired pre-qualifying requirement of worth Rs.1.50 crores. On the scrutiny of the copy of letter of intent for rate contract on item rate basis for reconditioning/repair of belts with M/s. Northern Coalfields Limited, vide their order dated 22/01/2003 submitted by the petitioner it was found that the order placed by M/s. Northern Coalfields Limited for various works is for repairing/re-conditioning of steel cord belts with through cut, repairing of damaged nylon conveyor belt by hot

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vulcanizing with through cut etc., which involves hot processing whereas the disputed tender was called for the work of conveyor belt joining, replacement of belt, rubber lagging on pulleys, patching, longitudinal joining etc., by cold vulcanizing process. On the aforesaid facts, it was found that the petitioner was not eligible for participating in the instant case as such the offer of the petitioner was liable for rejection.

5) It has been further submitted that the work of conveyor belt joining, replacement of belt, rubber lagging etc., in a thermal power station is a very sensitive nature of work and for uninterrupted and smooth operation of conveyor belt, regular maintenance by process of joining, replacement and rubber lagging is of utmost necessity at site itself and that can be done only by cold vulcanizing process. In hot vulcanizing process, on site repairing is of more time consuming and requires compulsory shut down for thrice the time period then applicable to cold vulcanizing process, therefore, a person who does not have requite experience in cold vulcanizing process may not render services as required in the NIT.

6) Therefore, the Board which comprise of experts, in its wisdom, thought it proper in the interest of its power generating units to drop the tender and accordingly at the Apex level of Board final decision to re-tender was taken on 12/08/2004, therefore, by no stretch of imagination the decision taken by the respondent can be said to be arbitrary, illegal or mala fide so as to favour the respondent No.3. The Board never wanted to award the contract to

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respondent No.3. The Board has right to accept or reject wholly or partly any or all the tenders without assigning any reason. In the instant case the Board has taken the decision to re-tender with reasons which are logical, justifiable and borne out of the tender conditions relating to pre-qualification.

7) Respondent No.3 also filed his return in which he vehemently refuted the allegations leveled by the petitioner against him.

8) Petitioner filed rejoinder and averted that the respondents No. 1 and 2 took the decision to re-tender the contract to benefit the respondent No.3. Petitioner has experience of executing the work of stipulations as mentioned in the tender notice by cold as well as by hot vulcanizing and has executed total work order of Rs.3.5 crores. It has been further averted that if for any reason, the Board is insisting upon experience of execution of similar type of work of cold vulcanizing, then also the petitioner fully possessed the said experience and qualification and the works conducted by it were detailed in Annexure P/10.

9) Petitioner's contention is that respondent No.1 has no power to reject the tender and price bid submitted by the petitioner arbitrary and the Court has ample power to review the same, to support this contention, counsel for the petitioner relied upon the judgments delivered by Hon'ble Apex Court in **Tata Cellular Vs. Union of India, reported in AIR 1996 SC 11 and Kumari Shrilekha Vidyarthi Vs. State of U.P and others, reported in**

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AIR 1991 SC 537. In Tata Cellular Vs. Union of India, Hon'ble the Apex Court has laid down that;

> *"The duty of the court is to confine itself to the question of legality. Its concern should be,*
>
> 1. *Whether a decision-making authority exceeded its powers?*
> 2. *committed an error of law*
> 3. *committed a breach of the rules of natural justice;*
> 4. *reached a decision which no reasonable Tribunal would have reached; or*
> 5. *abused its powers.*
>
> *Therefore, it is not for the court to determine whether particular policy of particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under.*
>
> *(i) Illegality: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.*
>
> *(ii) Irrationality, namely Wednesbury unreasonableness.*
>
> *(iii) Procedural impropriety.*
>
> *The above are only the broad grounds but it does not rule out addition of further grounds in course of time. (paras 93,94,95).*
>
> *The principles deductible relating to scope of judicial review of administrative decisions and exercise of contractual powers by government bodies are:*
>
> *(1) The modern trend points to judicial*

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restraint in administrative action.

(2) The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without, the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fairplay in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure".

Hon'ble the Apex Court in the case of **Ku. Shrilekha Vidhyarthi** (supra) held that:

"State actions in contractual matters can be reviewed under Art.14 of the Constitution."

Petitioner further relied on the decision rendered by the Apex Court in **Ramana Dayaram Shetty Vs. The International**

Airport Authority of India and others, in support of his claim regarding eligibility. Hon'ble the Apex Court has laid down thus;

> *"the Tender Notice stated in clear terms that "sealed tenders in the prescribed form are hereby invited from Registered IInd Class Hoteliers having at least 5 years' experience for putting up and running a IInd Class Restaurant and two Snack Bars at this Airport for a period of three years."*
> *Held, that on a proper construction what the notice required was that only a person running a registered IInd Class hotel or restaurant and having at least 5 years' experience as such should be eligible to submit a tender. This was a condition of eligibility and it is difficult to see how this condition could be said to be satisfied by any person who did not have five year's experience of running a IInd Class hotel or restaurant. The test of eligibility laid down was an objective and not a subjective one."*

10) Annexure P/2 filed by the petitioner is the tender notice No.26/2003. Clause 1 envisages the qualifying condition for obtaining the tender documents. The same is reproduced below:

> *"1. <u>QUALIFYING CONDITIONS FOR OBTAINING TENDER DOCUMENTS-</u> The tender form will be issued to only those bidders who-*
>
> *1. will submit documentary evidence for successful execution of similar work worth Rs.1.5 Crores during last three years, which should include at least one single order of Rs.50 lacs.*
>
> *AND*
>
> *2. will submit the proof of successful execution of order for 'similar type' of work from order placing authority/organization, which must be any of the following:*
>
> *(i) Thermal Power Plant of State Electricity Board/Corpn.*
>
> *(ii) NTPC.*

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(iii) Thermal Power Plant owned by private Companies.

(iv) Other Govt/Semi Govt. Organization having material handling systems using conveyor belt of width 800 mm & above."

11) Respondents No.1 and 2 stated that the list/details of order executed by the firm i.e., petitioner during last three years in respect of scope of work specified in the tender is for Rs.63,41,996/- against desired pre-qualifying requirement of worth Rs.1.50 crores and also stated that on the scrutiny of the order submitted by the petitioner, it has been noted that the order placed by M/s. Northern Coalfields Limited for various works is for repairing/re-conditioning of steel cord belts with through cut, repairing of damaged Nylon conveyor belt by hot vulcanizing with through cut etc., which involves hot processing whereas our tender is for the work of conveyor belt joining, replacement of belt, rubber lagging on pulleys, patching, longitudinal joining etc., by cold vulcanizing process.

12) Petitioner has mentioned in its rejoinder that the petitioner has experience of executing the works of all stipulations by cold and hot vulcanizing and also stated that if for any reason, the Board is insisting for experience of similar type of work of cold vulcanizing, then also the petitioner possessed the said experience and to support the same it gave details in Annexure P/10. In Annexure P/10 except at page 5 the work

order amounting Rs. 5,43,000/- no other orders have been shown to be the work order relating to cold vulcanizing.

13) It is apparent that when tender form was obtained by the petitioner, whatever documents it has submitted at that time for satisfying its eligibility to the respondents No. 1 and 2 in those documents nothing was there to substantiate that it has successfully executed the work by cold vulcanizing process work worth Rs.1.50 crores during last three years which include at least one single work order of Rs. 50 lacs. Therefore, petitioner was not qualified to obtain and submit tender form.

14) The contention of the petitioner is that the condition requires the similar work and according to it, hot vulcanizing process is the similar work. In very specific words respondents No. 1 and 2 in their return have made distinction between hot and cold vulcanizing process. It is also apparent that hot and cold are opposite ends and if any work is required to be done in cold condition, the same cannot be equated with the work to be done in hot condition, therefore, the contention of the petitioner that it was doing the work of joining conveyor belt by hot vulcanizing process is similar of cold vulcanizing process, cannot be accepted. More emphasis has been given by the petitioner during argument that non-acceptance of its tender may lead to corruption in public sector and public exchequer may suffer the loss of Rs.42 lacs. This contention has no leg to stand as no other tender has been accepted, but re-tender has been fairly ordered.

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15) It is manifest that the supply of coal through conveyor belt is a sensitive nature of work and any fault may seriously affect the productivity, therefore, it is for the experts to take decision as to by which process in Thermal Plant they prefer joining conveyor belt and it is for the experts to choose and select the proper and suitable tenderer. If they had chosen the cold vulcanizing and accordingly invited tenders then, it is for the competitor to have necessary qualification and experience as required by the Board.

16) Admittedly on the date of filing of the tender, the petitioner submitted various documents, however, on the basis of those documents the petitioner failed to establish that the petitioner had successfully executed the work of conveyor belt joining, replacement of belt, rubber lagging on pullcys, patching, longitudinal joining etc., by cold vulcanizing process worth Rs.1.5 crores during last three year, which includes at least one single order of Rs.50 lacs. Therefore, when the petitioner was not entitled to get the tender form it cannot be said that it was qualified to bid and file tender and when it was apparent that on the date of filing the tender, according to the documents of the petitioner itself, the petitioner having no requisite qualification was not entitled to participate, it cannot be said that the Board on that count refusing to accept the bid, has acted arbitrary.

17) Petitioner has an opportunity to participate when notice inviting tender will be issued afresh by the Board, if it possesses requisite qualification.

18) Taking into account all the facts, material on record and the aforesaid discussions, I am of the opinion that the respondent No.1 has not acted arbitrary in taking decision to re-tender the work, hence neither the decision taken by respondent No.1 can be quashed by issuance of any writ of certiorari nor respondents No. 1 and 2 can be asked to award the impugned work to the petitioner. Therefore, the petition filed by the petitioner deserves to be dismissed and is accordingly dismissed. Consequently, M.W.P.Nos. 1658/2004, 142/2005, 1284/2005 and I.A.No.6153/2004 stand disposed of.

Sd/-
Vijay Kumar Shrivastava
Judge
15/06/2005

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